

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SENIOR HOUSING ASSISTANCE
GROUP,

Plaintiff,

v.

AMTAX HOLDINGS 260, LLC, et al.,

Defendants.

No. 2:17-cv-01115-RSM

**DEFENDANTS AND COUNTER-
PLAINTIFFS' RESPONSE TO
PLAINTIFF'S MOTION IN LIMINE**

**NOTE ON MOTION CALENDAR:
FEBRUARY 8, 2019**

ORAL ARGUMENT REQUESTED

AMTAX HOLDINGS 260, LLC, et al.,

Counter-Plaintiffs,

v.

SENIOR HOUSING ASSISTANCE
GROUP, et al.,

Counter-Defendants.

I. INTRODUCTION¹

Plaintiff and Counter-Defendant Senior Housing Assistance Group (“SHAG”) asks in its motion in limine² for the Court to direct Defendants and Counter-Plaintiffs (the “Limited Partners”) to comply with Local Civil Rule (“LCR”) 43(j).³ (*See* Dkt. # 131.) In asking the Court for such an order, SHAG expresses concern that the Limited Partners’ two experts, David Von Tilius and Jon Krabbenschmidt, may provide duplicative testimony. (*Id.* at 1–2.) As explained below, the Court should deny SHAG’s motion because (a) Mr. Krabbenschmidt’s and Mr. Von Tilius’s testimony are not duplicative, and (b) the order SHAG seeks is unnecessary and premature. In presenting the testimony of each expert, the Limited Partners will comply with LCR 43(j) and will not burden the Court with cumulative testimony. There accordingly is no basis or need for the Court to enter an order proactively directing the Limited Partners to comply with that Local Civil Rule (or any other).

**II. THE LIMITED PARTNERS’ EXPERT WITNESSES WILL NOT OFFER
DUPLICATIVE TESTIMONY**

Mr. Krabbenschmidt and Mr. Von Tilius’s testimony is not duplicative because their testimony will address different, though related, subjects. While the testimony from each expert will help inform the Court’s determination of the ultimate question presented in this litigation—i.e., the circumstances under which an option or a right-of-first-refusal can be exercised pursuant to the limited partnership agreements for the Project Partnerships—each expert provides unique perspectives that will be helpful to the Court.

Mr. Krabbenschmidt is a founding member of Novogradac LLP, the leading national accounting firm providing services to the low-income housing tax credit (“LIHTC”) industry.

¹ The Limited Partners are filing two separate responses because Counter-Defendants filed two separate motions. Both responses combined are within the page limitation for responses to motions in limine. *See* Local Rules W.D. Wash. LCR 7(e)(5).

² SHAG’s motion in limine was also filed on behalf of its wholly owned subsidiary, Third Party Defendant Senior Housing Assistance Corporation (“SHAC”).

³ Local Civil Rule 43(j) reads in its entirety as follows: “Except as otherwise ordered by the court, a party shall not be permitted to call more than one expert witness on any subject.” Local Rules W.D. Wash. LCR 43(j).

Mr. Krabbenschmidt is uniquely qualified to provide testimony concerning LIHTC industry custom and practice, and that will be the focus of his testimony. Mr. Krabbenschmidt will assist the Court in understanding how the LIHTC industry functions so that the Court has the proper context for interpreting and applying the agreements at issue in this case. In contrast, Mr. Von Tilius draws on his years of professional experience and his Masters in Taxation to offer testimony intended to assist the Court in understanding the interplay of the complex federal income tax concepts at issue here. While Mr. Von Tilius draws on his experience in the LIHTC industry in forming his opinions, his testimony will not be offered to explain LIHTC industry custom and practice; that explanation will be offered by Mr. Krabbenschmidt.

Given that each of these two witnesses will offer different testimony concerning the issues in this case, it would be error to exclude the testimony of either of them. Indeed, in interpreting LCR 43(j), courts in this District have refused to exclude expert testimony where two experts' opinions addressed the same issue, but ultimately concerned different subjects, and this Court should do the same. *See, e.g., A.T. v. Everett Sch. Dist.*, No. C16-1536JLR, 2017 WL 4811361, at *8–9 (W.D. Wash. Oct. 25, 2017) (denying a LCR 43(j) motion in a case where plaintiff alleged sexual misconduct by a former teacher because although the school district's two challenged experts opined on the school district's standard of care, one expert addressed school policies and training and the other addressed different aspects of the school district's standard of care); *see also Bancroft Life & Cas. ICC, Ltd. v. Scolari*, No. 3:11-cv-5017RBL, 2012 WL 1655659, at *2 (W.D. Wash. May 10, 2012) (denying a LCR 43(j) motion where one expert was an actuary opining on actuarial "principles and methods" and the other expert would testify about assessments in the captive insurance context).

III. THE REQUESTED ORDER IS UNNECESSARY AND PREMATURE

A court order directing the Limited Partners to comply with LCR 43(j) at this juncture is also unnecessary and premature. Courts consider enforcing LCR 43(j) in the context of trial management and ensuring that repetitive testimony does not waste the court's time. *See, e.g.,*

1 *Theoharis v. Rongen*, No. C13-1345RAJ, 2014 WL 3563386, *1–2, 9 (W.D. Wash. July 18,
 2 2014) (declining to enter an in limine order under LCR 43(j) in a police shooting case where the
 3 parties collectively proposed that 25 witnesses testify in a 7 to 10 day trial, but directing the
 4 parties to confer concerning the presentation of evidence in order to ensure compliance with the
 5 rule because having so many experts testify was impossible). Here, the Limited Partners only
 6 offer two experts, who have markedly different backgrounds and will offer different, albeit
 7 complementary, testimony. The situation here is thus a far cry from the 25 expert witnesses
 8 proffered in *Theoharis*, and even there the court declined to issue an order under LCR 43(j)
 9 before allowing the parties a chance to limit the number of experts that would testify.

10 The Limited Partners intend to comply with LCR 43(j) and will not waste the Court's
 11 time with duplicative expert testimony. Indeed, the Limited Partners are hopeful that this case
 12 can be completed in fewer than the currently-scheduled ten trial days. The number of fact
 13 witnesses in this case is limited, and the Limited Partners believe that the testimony of their two
 14 proffered experts will assist the Court in understanding the complexities of the LIHTC industry.
 15 Given that Mr. Krabbenschmidt and Mr. Von Tilius will not provide duplicative testimony, and
 16 the Limited Partners are aware of and fully intend to comply with LCR 43(j), the order sought by
 17 SHAG's motion is unnecessary and premature.

18 **IV. CONCLUSION**

19 For the reasons stated herein, this Court should deny SHAG's motion in limine.

20 RESPECTFULLY SUBMITTED this 6th day of February, 2019.

21 **Perkins Coie LLP**

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Attorneys for the Limited Partners

CERTIFICATE OF SERVICE

On February 6, 2019, I caused a copy of the foregoing document to be electronically filed via the Court's Electronic Case Filing System, which will notify all attorneys of record of the filing.

By: /s/ Steven D. Merriman
Steven D. Merriman